IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2958 OF 2004

In

APPEAL NO.744 OF 1996

In

T. & I.J. PETITION NO.344 OF 1988

In

T. & I.J. SUIT NO.30 OF 1989

Shardaprasad Ramkishore Tiwari
(since deceased):
Manoj Shardaprasad Tiwari & Anr. : Appellants

V/s.

Shriprakash Ramkishore Tiwari
(since deceased):
Siddharth Shriprakash Tiwari & Ors. : Respondents

...

Mr.R.P.Ojha for the appellants.

Ms G.P.Bharucha for respondent Nos.1 to 3.

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CORAM : R.M.LODHA & S.A.BOBDE,JJ.

DATE : AUGUST 22, 2006.

P.C.

1. This is a Motion for restoration of the appeal which was dismissed for want of prosecution on 13.11.2003.

2. The order dated 13.11.2003 reads thus:-

> "Mr.Dhopatkar, Advocate appears for the Appellant and submits that the Appellant has taken away brief papers from him and he has no instructions in the matter.
>
> 2. In the circumstances, we dismiss the Appeal for want of prosecution. No costs."

3. On 4.10.2004, the Notice of Motion was taken out by the original appellant. Affidavit-in-suppaort of the Notice of Motion had been filed by one of his sons who is also the Constituted Attorney of the appellant. The original appellant is said to have died on 7.12.2005 and his legal representatives have been brought on record.

4. In the affidavit-in-support of the Notice of Motion, it is admitted that brief papers were collected from the erstwhile Advocate in the month of May, 2003. Save and except the bald statement that the appellant was about 68 years old and suffering from high diabetes, there is nothing to indicate as to why the new Advocate could not be appointed by the appellant after the brief papers were collected from the erstwhile Advocate with no objection to engage some other Advocate. The medical papers pertaining to the ailment of the appellant are not also placed on record. If the deponent was looking after the case and he was the Constituted Attorney, there was no

reason why he could not engage some other Advocate after the erstwhile Advocate was discharged. It seems that the age of the appellant and his ailment have been set up as a make believe ground. The appeal came to be disposed of on 13.11.2003 and to make out a ground for condonation of delay, it is stated that in the month of June 2004, the appellant engaged the present Advocate and applied for a certified copy of the order dated 13.11.2003 which was obtained on 3.9.2004 and then the present Motion was taken out.

5. We are not persuaded to accept the explanation given by the appellant. Make believe grounds seem to have been set up for condonation of delay and for restoration of the appeal.

6. Notice of Motion does not deserve to be granted and is dismissed.

R.M. LODHA, J.

S.A. BOBDE, J.